Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM 1998

DENNIS CAMPBELL, SR. AND TAMMIE CAMPBELL,
AS NEXT FRIENDS OF DENNIS CAMPBELL, JR.,
Petitioners,

v.

BUTCH MCALISTER,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a five-year-old public school student has a protectable interest in bodily integrity to be free from the use of excessive force by a police officer under the Fourth and Fourteenth Amendments to the Constitution of the United States, although the student does not manifest outward, physical proof of injury.

2. Whether a five-year-old public school student has a protectable interest in bodily integrity to be free from the use of excessive force by a police officer under the Fourth and Fourteenth Amendments to the Constitution of the United States, although there is a state interest in reducing violence in public schools.

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PETITION FOR WRIT OF CERTIORARI

Dennis Campbell, Sr. and Tammie Campbell, as next friends of Dennis Campbell, Jr., Petitioners, respectfully pray that the Supreme Court of the United States issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on October 20, 1998.

OPINION BELOW

The United States Court of Appeals for the Fifth Circuit issued its unpublished opinion in this case on October 20, 1998. *Campbell v. McAlister*, No. 97-20675 (5th Cir. Oct. 20, 1998) (Slip Op.). (Appendix A.)

JURISDICTION

The jurisdiction of this Court to review the Fifth Circuit's judgment by writ of certiorari is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

(1) Amendment IV to The Constitution of The United States

(2) Amendment XIV, Section 1, to The Constitution of The United States

(3) 42 U.S.C. § 1983

STATEMENT OF THE CASE

A. Procedural History

This case involves deprivation of a young child's constitutional rights by a police officer actionable under 42 U.S.C. § 1983. Petitioners are husband and wife ("the Campbells"), and son ("Dennis"). Respondent ("Officer McAlister") is a police officer. On February 24, 1994, while working at an elementary school, Officer McAlister used excessive force in response to minor misbehavior by five-year-old Dennis.

The Campbells, on behalf of Dennis, brought suit in Texas state court against Officer McAlister, the Fort Bend County, Texas Independent School District, and the City of Sugar Land, Texas for deprivation of their son's rights under the Fourth and Fourteenth Amendments to the United States Constitution, via § 1983. The defendants removed to federal court on April 24, 1996.

The defendants filed motions for summary judgment, asserting immunity and contesting the evidence to support Petitioners' claims. The district court granted the motions, dismissed all defendants, and entered final judgment on July 7, 1997.

The Campbells and Dennis appealed the grant of summary judgment to Officer McAlister only. On October 20, 1998, a panel of the United States Fifth Circuit Court of Appeals affirmed the district court, and held that Dennis did not have

colorable claims under § 1983 because it believed that: (1) there was no outward, physical proof of injury to Dennis, as the court thought is required; and (2) police officers are permitted to use force as Officer McAlister did because there is violence in public schools.

B. Statement of Facts

Dennis Campbell, Jr. was a five-year-old, African-American student in Kelly Hanse's kindergarten class at Dulles Elementary School in Sugar Land, Texas, an affluent, predominately white suburb of Houston. On February 28, 1994, Dennis was misbehaving in class. Dennis was upset because he thought Ms. Hanse had treated him unfairly earlier in the day. Dennis refused to do his work and threw a paper clip. Ms. Hanse told Dennis that he had forfeited his play time because he was misbehaving. Dennis then refused to stand up as ordered, and Ms. Hanse requested the assistance of Assistant Principal Beverly Bollinger. Ms. Bollinger told Dennis to go to the principal's office. Dennis refused to stand up or move and told Bollinger to "shut up."

Respondent Oliver "Butch" McAlister was a police officer for the City of Sugar Land assigned to the school as a D.A.R.E. (Drug Abuse Resistance Education) officer.[1] Officer McAlister, who is white, was on duty in his police officer's uniform on February 28, 1994.

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[1]D.A.R.E. is a nationwide drug prevention program.

Ms. Bollinger asked McAlister to assist in removing Dennis from the classroom and escort him to the principal's office. When Dennis refused Officer McAlister's order to rise from his seat, the police officer slammed Dennis to the ground, causing the boy to hit his head, and then dragged him 200 to 300 feet to the principal's office.[2]

Later that day, Dennis complained that his neck, head, and shoulders hurt due to the officer's assault. The next morning, Mrs. Campbell took Dennis to a doctor, who discovered bruises on and under his arm. The physician concluded that Dennis was traumatized and suffers from fear, anxiety, asthma, and bedwetting as a result of the February 28, 1994 incident.

C. Basis for Federal Jurisdiction in the District Court

The district court had subject matter jurisdiction of this case under 42 U.S.C. § 1983, and 28 U.S.C. § 1331 (federal question).

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[2]Of course, Officer McAlister's version of events differs, and he contends that he merely lifted Dennis out of his chair and walked hand-in-hand with him to the principal's office.

REASONS FOR GRANTING THE PETITION

I. Public school students have a protectable interest in bodily integrity to be free from the use of excessive force by police officers under the Fourth and Fourteenth Amendments to the Constitution of the United States, although the student does not manifest outward, physical proof of injury.

II. Public school students have a protectable interest in bodily integrity to be free from the use of excessive force by police officers under the Fourth and Fourteenth Amendments to the Constitution of the United States, although there is a state interest in reducing violence in public schools.

The right of our children to be free from physical and emotional abuse in our public schools is an important matter that should be considered by this Court. This writ of certiorari should be granted because a lack of guidance by this Court in the area of constitutional protections to be afforded students has lead to the circuit courts fashioning doctrines far removed from basic principles regarding constitutional review. Simply put, the courts of appeals allow no protection for students unless their bones are broken and their wounds are bleeding, and the courts sanction violence against young children in the name of suppressing violence.

The United States Court of Appeals for the Fifth Circuit relied on its own precedents regarding corporal punishment in analyzing Petitioners' claims under the Fourth and Fourteenth Amendment.[3] However, standards regarding the infliction of corporal punishment by school teachers and administrators have no bearing on this case, where a police officer was merely assigned the duty of transporting Dennis to the principal's office for the meting out of punishment, should the principal have found it necessary.

The Fifth Circuit frankly admitted in the opinion that it issued in this case, "The Supreme Court has not yet addressed whether the use of excessive force by public school officials against students implicates a specific constitutional right." *Campbell v. McAlister*, No. 97-20675 (5th Cir. Oct. 20, 1998) (Slip Op. at 6.) Indeed, as the district court recognized,

> The Supreme Court has explicitly refused to address whether excessive force by public school teachers and administrators against students implicates a constitutional right. In *Ingraham v. Wright*, 97 S. Ct. 1401 (1977), the Court held that corporal punishment in the schools did not implicate a right to be free from cruel or unusual punishment under the Eighth Amendment. *Id.* at 1412. It also decided that, while corporal punishment in schools does implicate students' liberty inter-

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[3] *See Fee v. Herndon*, 900 F.2d 804 (5th Cir.), *cert. denied*, 498 U.S. 908 (1990); *Cunningham v. Beavers*, 858 F.2d 269 (5th Cir. 1988), *cert. denied*, 489 U.S. 1067 (1989); *Woodard v. Los Fresnos Indep. Sch. Dist.*, 732 F.2d 1243 (5th Cir.1984); *Coleman v. Franklin Parish Sch. Bd.*, 702 F.2d 74 (5th Cir. 1983) (per curiam). (See Slip Op. at 6, 12.)

> ests, students are not entitled to procedural due process under the Fourteenth Amendment before corporal punishment is inflicted: "traditional common-law remedies are fully adequate to afford due process." *Id.* at 1413.

Campbell v. McAlister, No. H-96-CV-1316 (S.D. Tex. July 3, 1997) (Mem. Op. at 18).

The result is that the courts below are fashioning law that emphasizes factors that have no bearing on the conduct of state officials or students and the circumstances presented, and which affords little protection for those most in need of protection in our society, our children.

The effect of the lack of guidance from this Court in this area is apparent upon reviewing the circuit court's opinion in this case. The Fifth Circuit held that Dennis did not have a colorable claim under § 1983 because it believed that: (1) there was no outward, physical proof of injury to Dennis, as it contends is required; and (2) police officers are permitted to use force as Officer McAlister did because there is violence in public schools.

Regarding its first rationale, the Fifth Circuit has established what can be characterized as an objective medical evidence test to determine whether the use of force by a state official is reasonable. This test concentrates on the outward manifestation of physical injury to the student, rather than the conduct of either the state official or the student. While stating

it accepted as true[4] Petitioners' allegations that Officer McAlister slammed Dennis to the floor and dragged him 200 to 300 feet to the principal's office, (see Slip Op. at 3), the court below somehow found it important that five-year-old Dennis suffered no bleeding or broken bones.[5] In other words, according to the lower court, a student has no constitutionally-protectable interest where a state official is careful in inflicting injury so as to not create an outward manifestation,[6] or a student who bruises easily has more protection than one who does not.

The circuit court also apparently pays no heed to non-physical injury, although it is reasonable to think that a white,

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[4]In reviewing a grant of summary judgment, the appellate court must accept the evidence of the non-moving party as true and draw all justifiable inferences in its favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

[5]The court below noted:

> . . . evidence in the record belies any inference that, if [Dennis] was thrown to the ground, it was with unreasonable force. Deposition testimony and the medical records of the doctor who examined Dennis made clear that he did not suffer any significant harm as a result of the incident. Minor bruising as a result of school discipline has never been sufficient harm to establish a constitutional injury. Compare Ingraham[v. Wright, 525 F.2d 909, 911, 917 (5th Cir. 1976) (en banc), aff'd on other grounds, 430 U.S. 651 (1977)] (twenty licks with a paddle resulting in "a painful bruise that required the prescription of cold compresses, a laxative, sleeping, and pain-killing pills and ten days of rest at home and that prevented [the child] from sitting comfortably for three weeks" insufficient to establish a constitutional harm). (Slip op. at 10.)

[6]During the conflict in Vietnam, the Viet Kong strung up American captives with rope and beat the soles of their feet, leaving no scarring to be viewed by delegations of the International Red Cross. HERR, DISPATCHES (1967).

uniformed police officer's assault of a five-year-old African-American child could cause permanent emotional scarring.[7] For example, Dennis can bloody his nose, break an arm, and tear his clothing playing baseball — such injuries have no lasting effect, are easily healed, and perhaps are even badges of honor for a young boy, despite the pain. *It is, therefore, the context of the conduct that is important.* Nevertheless, only physical injury fits into the Fifth Circuit's schematic, what can be objectively seen on an x-ray.[8]

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[7]*See generally* BLINDER, PSYCHIATRY IN THE EVERDAY PRACTICE OF LAW 97 (1982); BARTON, RECOVERING FOR PSYCHOLOGICAL INJURIES 13 (1990) (noting that severe psychological injury may occur without physical injury, the threat or fear of physical injury and impairment can be more provocative of psychological disturbance than the actual physical condition, and that the loss of peace of mind and enjoyment of living as the result of psychological injury can have a much more significant affect on an individual than a serious physical injury with little concomitant psychological trauma).

[8]Perhaps the other side of the coin to the Fifth Circuit's analysis was presented in *P.B. v. Koch*, 96 F.3d 1298 (9th Cir. 1996). In *Koch*, the court considered three separate incidents involving a principal who allegedly used excessive force against students. The principal allegedly repeatedly slapped and choked one student for calling him a name; punched another student who disobeyed an order to be quiet; and choked yet another student who disobeyed an order to remove his hat. *Koch*, 96 F.3d at 1299-1300. Because the principal's alleged actions were "clearly unlawful" under any standard, the court did not decide whether the proper analysis was a Fourth Amendment seizure or a Fourteenth Amendment due process deprivation; therefore, the Ninth Circuit declined to decide whether the Fourth Amendment rather than the Fourteenth Amendment applies to cases involving allegations of excessive force against a student by a school official. *Koch*, 96 F.3d at 1303 n.4. While the alleged conduct in *Koch* involved three students, it is hard to see how the principal's conduct involving *each* student was any more severe than Officer McAlister's assault of Dennis. For example, the three students in *Koch* were teenagers in high school. *Id.* at 1299-1300. The result is that it appears that constitutional rights become a numbers game. If multiple parties sue, only then do they have rights.

Petitioners suggest that this Court should grant certiorari in this case and announce a standard for analyzing these types of claims that concentrates on whether the use of force is "excessive" — that is, whether the state official's conduct is commensurate with the student's conduct to decide whether the use of force meets the threat.

The second reason the court of appeals gave for affirming the grant of summary judgment is that Officer McAlister's conduct was justified

> [g]iven our recent rash of school shootings across the nation. . . . [and because of] disorder . . . [in] particularly ugly forms: drug use and violent crime in the schools [that] have become major social problems. . . .

(Slip Op. at 9, quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 339 (1985).) The court below noted that

> [i]t is against this backdrop that we examine the Campbells's claim that the forcible removal [of] their son Dennis from his classroom amounted to an unreasonable seizure.

(Slip Op. at 9.)

This Court should grant this writ of certiorari because a lack of guidance from this Court has resulted in the development of such static frameworks by the circuit courts that

produce absurdist results. Even accepting Officer McAlister's evidence as altogether true, there is no reasonable basis to believe that the police officer acted as he did because he feared that five-year-old Dennis carried a gun, was using drugs, or intended to commit a violent crime.

Certainly the state has an interest in preventing crime and apprehending lawbreakers, and educators, with specialized training to deal with problems regarding children, should be allowed a certain amount of discretion to control the environment in our schools. But such was not the case here. Dennis presented no imminent threat, and Officer McAlister is a police officer, not an educator. If anything, a white, uniformed police officer manhandling a five-year-old black child serves to promote violence, not deter it. Undoubtedly, McAlister's conduct did nothing to promote an atmosphere conducive to learning.

CONCLUSION

This Court should grant this petition for writ of certiorari because the courts of appeals have developed no legitimate framework for analyzing constitutional claims by school children involving use of excessive force by state officials. Therefore, this proceeding involves a question of exceptional importance.

This Court should reverse the Fifth Circuit and articulate a clear set of guidelines regarding the use of excessive force by state officials against public school children.

Dennis Campbell, Sr., Tammie Campbell, and Dennis Campbell, Jr., Petitioners, respectfully request that this Court grant their petition for writ of certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 97-20675

DENNIS CAMPBELL, SR., as next friend of Dennis Campbell, Jr.; TAMMIE CAMPBELL, as next friend of Dennis Campbell, Jr.,

Plaintiffs-Appellants,

versus

BUTCH McALISTER; THE CITY OF SUGARLAND; FORT BEND INDEPENDENT SCHOOL DISTRICT,

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Texas
(H-96-CV-1316)

Before JOLLY, BARKSDALE and BENAVIDES, Circuit Judges.

PER CURIAM:*

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*Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

The issue in this case is whether a school official's use of allegedly excessive force to remove a disruptive kindergarten student from his classroom constitutes an unreasonable seizure under the Fourth Amendment or a denial of substantive due process under the Fourteenth Amendment. In granting summary judgment against the plaintiff, the district court concluded that the use of force in this case was properly analyzed under the Fourteenth Amendment substantive due process standard and that it was not arbitrary or unrelated to legitimate school interests in violation of that standard. We hold that under either Amendment, the school official's use of force was not a constitutional violation.

I

A

On February 28, 1994, Dennis Campbell, Jr. ("Dennis"), a five-year-old kindergarten student at Dulles Elementary School, was misbehaving in class. Although the parties dispute whether Dennis was "completely out of control" or misbehaving to some lesser extent, the summary judgment evidence clearly demonstrates that his conduct was disruptive. At one point, Dennis refused to obey any more of his teacher's instructions. Feeling that she could no longer control him, the teacher requested the assistance of the assistant principal. Dennis, however, continued to be defiant, refused to stand up or move, and told the assistant principal to "shut up."

The assistant principal then summoned the help of Mr. Oliver McAlister, a Sugarland police officer who had recently been assigned to the Dulles school as part of a nationwide drug prevention program known as "D.A.R.E." Being the only adult male in the building at the time, McAlister was asked if he

would remove Dennis from the classroom and escort him to the principal's office. McAlister twice requested that Dennis get up and go with him, but Dennis refused.

At this point, the accounts of what happened diverge. The Campbells allege that McAlister "slammed [Dennis] to the floor" and "dragged [him] along the ground to the principal's office." They approximate the distance to the principal's office was around 200 to 300 feet. Nevertheless, in her deposition, Mrs. Campbell conceded that Dennis did not have any scratches, bleeding, or torn clothing. The doctor who examined Dennis the next morning discovered some bruising under his arm, but no other injury requiring x-rays or follow-up medical treatment. Although school officials describe a more belligerent Dennis and a less forceful McAlister, we will assume the truth of the Campbells' allegations.

B

On January 24, 1996, the plaintiffs-appellants Dennis Campbell Sr. and Tammie Campbell (the "Campbells"), as next friends of Dennis Jr., sued McAlister, the City of Sugarland (the "City"), and the Fort Bend Independent School District (the "FBISD") under 28 U.S.C. § 1983, and the Fourth and Fourteenth Amendments. They alleged that McAlister, while acting under the color of state law, used excessive force to remove Dennis from his classroom and that the City of and the FBISD were deliberately indifferent to Dennis's constitutional rights.

The Defendants each moved for summary judgment, which the district court granted. In a thorough and well-reasoned opinion, the district court determined that the Campbells failed to establish any factual basis for extending section 1983

liability for McAlister's actions to the City or FBISD. As to McAlister individually, who claimed qualified immunity, the court examined the merits of whether his conduct violated the Fourth or Fourteenth Amendments. Based on our cases applying a substantive due process standard to corporal punishment in schools, it concluded that the Fourteenth Amendment was the proper mode of analyzing the excessive force allegations in this case, not the Fourth Amendment.[1] Applying a substantive due process analysis, the court pointed out that the State of Texas provided adequate post-deprivation civil and criminal remedies for the mistreatment of students by school officials. Thus, it concluded, the Fourteenth Amendment claim failed as a matter of law.

The Campbells appealed the district court's grant of summary judgment in favor of McAlister, but not the City or the FBISD.[2]

II

We review a decision to grant summary judgment de novo, using the same standard as the district court. Ganther v. Ingle, 75 F.3d 207, 209 (5th Cir. 1996). Summary judgment is proper when there is no genuine issue of material fact exists, and the moving party is entitled to judgment as a matter of law. Lavespere v. Niagara Mach. & Tool Works, Inc., 910 F.2d 167,

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[1]The court did note that, even under a Fourth Amendment analysis, McAlister's conduct did not result in a constitutional violation because it was reasonable under the circumstances.

[2]Because the Campbells do not raise any point of error with respect to the resolution of their claims against the City and the FBISD, any claims against those defendants have been waived. See United States v. Musa, 45 F.3d 922, 925 (5th Cir. 1995).

178 (5th Cir. 1990). The court will not weigh the evidence or evaluate the credibility of witnesses; further, all justifiable inferences will be made in the nonmoving party's favor. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986).

III

The essence of the Campbells's claim in this case is that McAlister used excessive force to remove Dennis from his classroom. The Supreme Court has rejected the "notion that all excessive force claims brought under § 1983 are governed by a single generic standard." Graham v. Conner, 490 U.S. 386, 393 (1989). The proper analysis "begins by identifying the specific constitutional right allegedly infringed by the challenged application of force." Id. at 394. Whether the right has been violated "must then be judged by reference to the specific constitutional standard which governs that right." Id.

A

Since our en banc decision in Ingraham v. Wright, 525 F.2d 909 (5th Cir. 1976), aff'd on other grounds, 430 U.S. 650 (1977), we have consistently applied a substantive due process analysis to claims of excessive force in the context of corporal punishment at public schools. See, e.g., Fee v. Herndon, 900 F.2d 804 (5th Cir.), cert. denied, 498 U.S. 908 (1990); Cunningham v. Beavers, 858 F.2d 269 (5th Cir. 1988), cert. denied, 489 U.S. 1067 (1989); Woodard v. Los Fresnos Indep. Sch. Dist., 732 F.2d 1243 (5th Cir.1984); Coleman v. Franklin Parish Sch. Bd., 702 F.2d 74 (5th Cir. 1983) (per curiam). We have also applied this same analysis in the school context to the right to be free from "state-occasioned damage to a person's bodily integrity," see Doe v. Taylor Indep. Sch. Dist., 15 F.3d

433 (5th Cir.) (en banc) (sexual molestation by a teacher), cert. denied, 513 U.S. 815 (1994), as well as the right to be free from "bodily restraint," see Jefferson v. Ysleta Indep. Sch. Dist., 817 F.2d 303 (5th Cir. 1987) (student tied to chair with a jump rope).

The Supreme Court has not yet addressed whether the use of excessive force by public school officials against students implicates a specific constitutional right. It has, however, applied the Fourth Amendment to cases involving searches at public schools. See Veronia Sch. Dist. 47J v. Acton, 515 U.S. 646 (1995); New Jersey v. T.L.O., 469 U.S. 325 (1985). In doing so, the Court has made clear that the scope of the Fourth Amendment is not limited to criminal investigations, but rather, extends generally to searches and seizures by government actors. See T.L.O., 469 U.S. at 335.

Drawing on these cases, we and other courts have considered claims involving allegedly unreasonable detainment of students under the Fourth Amendment. See, e.g., Hassan v. Lubbock Indep. Sch. Dist., 55 F.3d 1075 (5th Cir.), cert. denied, 516 U.S. 995 (1995); Wallace v. Batavia Sch. Dist. 101, 68 F.3d 1010 (7th Cir. 1995); Edwards v. Rees, 883 F.2d 882 (10th Cir. 1989). In Hassan, school officials detained a sixth grader in a classroom as punishment for misbehaving on a field trip. The student was locked in the room, which contained a window and was monitored continuously, for 50 minutes until the other students could complete the field trip tour. See 55 F.3d at 1078. Examining the case under both the Fourth and Fourteenth Amendments, we held that the seizure was neither unreasonable nor a violation of substantive due process liberty interests. See id. at 1079-81.

Like the plaintiff in Hassan, the Campbells bring their

excessive force claim against McAlister pursuant to both the Fourth Amendment's proscription against unreasonable seizures and the Fourteenth Amendment's guarantee of substantive due process. Because we found no constitutional violation under either standard, we had no occasion to address the question whether, under Graham, analysis of the claim in Hassan should have been confined to the Fourth Amendment alone. Accord P.B. v. Koch, 96 F.3d 1298, 1301 n.4 (9th Cir. 1996) ("Under any standard, Koch's alleged actions were clearly unlawful. Thus, . . . we need not and do not resolve the question of whether the Fourth Amendment, rather than the Due Process Clause, protects a student from the use of excessive force by a school official."). We reach the same conclusion here. The Campbells simply have not alleged conduct rising to the level of an unreasonable seizure or a denial of substantive due process.

B

As the text of the Fourth Amendment indicates, "the ultimate measure" of the constitutionality of a governmental search or seizure is "reasonableness." Veronia, 515 U.S. at 652; see also T.L.O., 469 U.S. at 334. A "seizure" triggering the Fourth Amendment's protections occurs only when government actors have, by means of physical force or a sufficient show or authority, restrained an individual's liberty. See California v. Hodari D., 499 U.S. 621, 626, 628 (1991). Whether a given seizure meets the reasonableness standard "'is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests.'" Veronia, 515 U.S. at 652-53 (citations omitted). This reasonable inquiry is an official objective

one: "the question is whether the [government official's] actions are 'objectively reasonable' in light of the facts and circumstances confronting [him], without regard to [his] underlying intent or motivation." Graham, 490 U.S. at 397.

In the public school context, the Court had gone to great lengths to emphasize the special circumstances facing school administrators "in maintaining the special circumstances facing school administrators "in maintaining discipline in the classroom and on school grounds." T.L.O., 769 U.S. at 339; see also Veronia, 515 U.S. at 656 ("Fourth Amendment rights, no less than First and Fourteenth Amendment rights, are different in public schools than elsewhere; the 'reasonableness' inquiry cannot disregard the schools' custodial and tutelary responsibility for children."). Given our recent rash of school shootings across the nation, what the Court observed 13 years ago in T.L.O. seems as pertinent today as ever:

> Maintaining order in the classroom has never been easy, but in recent years, school disorder has often taken particularly ugly forms: drug use and violent crime in the schools have become major social problems. . . . Even in schools that have been spared the most severe disciplinary problems, the preservation of order and a proper educational environment requires close supervision of schoolchildren, as well as the enforcement of rules against conduct that would be perfectly permissible if undertaken by an adult.

469 U.S. at 339. It is against this backdrop that we examine the Campbells's claim that the forcible removal of their son Dennis from his class amounted to an unreasonable seizure.

Even assuming the full use of force alleged by the Campbells, the coercive nature of McAlister's conduct in removing

Dennis form his classroom was not unreasonable under the circumstances. Dennis had refused to leave the room or even to stand up. Repeated requests that he voluntarily do so were even met with silence or defiant orders to "shut up." Thus, to dislodge Dennis and maneuver him to the principal's office, some use of force was apparently going to be necessary. Because of his youth, Dennis's allegations that he was "slammed" to the ground causes us concern. But other evidence in the record belies any inference that, if he was thrown to the ground, it was with unreasonable force. Deposition testimony and the medical records of the doctor who examined Dennis make clear that he did not suffer any significant harm as a result of the incident. Minor bruising as a result of school discipline has never been sufficient harm to establish a constitutional injury. Compare Ingraham, 525 F.2d at 911, 917 (twenty licks with a paddle resulting in "a painful bruise that required the prescription of a cold press, a laxative, sleeping, and pain-killing pills and ten days of rest at home that prevented [the child] from sitting comfortably for three weeks" insufficient to establish a constitutional harm).

The fact that less force could have been used, or that a more appropriate punishment may have been available, is not enough to establish that the punishment administered was unconstitutional. See Hassan, 55 F.3d at 1081-82.[3] The Fourth Amendment's reasonableness standard must afford school officials with a relatively wide range acceptable action in dealing with

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[3]Conduct sufficient to establish an excessive force tort claim will not necessarily be so unreasonable as to establish a viable constitutional claim. Cf. Daniels v. Williams, 474 U.S. 327, 332 (1986) ("Our Constitution deals with the large concerns of the governors and the governed, but it does not purport to supplant traditional tort law in laying down rules of conduct to regulate liability for injuries that attend living together in society.").

disruptive students. See T.L.O., 469 U.S. at 340 ("maintaining security and order in schools requires a certain degree of flexibility in school disciplinary procedures, and we have respected the value of preserving the informality of the student-teacher relationship"). This approach is "consistent with the Supreme Court's view 'that the education of the Nation's youth is primarily the responsibility of the parents, teachers, and state and local officials, and not federal judges.'" Wallace, 68 F.3d at 1014 (quoting Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988)); cf. Ingraham, 525 F.2d at 917 ("it is not the court's duty to judge the wisdom of particular school regulations governing matters of internal discipline").

McAlister's alleged efforts to subdue Dennis and move him to the principal's office were fairly tailored to Dennis's admitted misbehavior and certainly not so excessive as to be unreasonable under the circumstances. "Events calling for discipline [in pubic schools] are frequent occurrences and sometimes require immediate, effective action," Goss v. Lopez, 419 U.S. 565, 580 (1975). The situation here reasonably called for immediate action. Because McAlister's conduct was not objectively unreasonable as a matter of law, the district court did not err in concluding that the Campbells failed to establish a Fourth Amendment claim.

C

We turn next to the Campbells's claim that McAlister used excessive force in violation of Dennis's substantive due process rights. Corporal punishment in public schools "is a deprivation of substantive due process when it is arbitrary, capricious, or wholly unrelated to the legitimate state goal of maintaining an atmosphere conducive to learning." Woodard, 732 F.2d at

1246). "[I]njuries sustained incidentally to corporal punishment, irrespective of the severity of these injuries or the sensitivity of the student, do not implicate the due process clause if the forum state affords adequate post-punishment civil or criminal remedies for the student to vindicate legal transgressions." Fee, 900 F.2d at 808; see also Cunningham, 858 F.2d at 272. If, however, an excessive use of force is wholly unrelated to legitimate school interests, it is quite likely that no post-deprivation remedy would meet the requirements of due process. See Doe, 15 F.3d at 451-52; id. at 461 (Higginbotham, J., concurring).

In this case, there is no question that McAlister's use of force to remove Dennis from his classroom were rationally related to legitimate school interests in maintaining order. As the district court noted, and the Campbells apparently concede, Texas provides civil and criminal post-deprivation remedies for the excessive use of force by school officials. Thus, the district court correctly concluded that the Campbells's substantive due process claim fails as a matter of law.

IV

For the forgoing reasons, the judgment of the district court is

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION

DENNIS CAMPBELL, SR., et al.,	§	
	§	
Plaintiffs,	§	
	§	
VS.	§	CIVIL ACTION
	§	NO. H-96-1316
OLIVER "BUTCH" McALISTER, *et al.*,	§	
	§	
Defendants.	§	

MEMORANDUM AND OPINION

Pending before this court are the following motions:

- motions for summary judgment filed by defendants, the City of Sugarland ("City"), Oliver "Butch" McAlister ("McAlister"), and Fort Bend Independent School District ("FBISD"), (Docket Entry Nos. 39 and 40);
- a motion for leave to take depositions filed by FBISD, the City, and McAlister (Docket Entry Nos. 45 and 49); and
- a motion to strike the affidavit of Joseph W. Glezman filed by the City and McAlister (Docket Entry No. 43).

Based on a careful review of the motions, pleadings, the parties' submissions, and the applicable law, this court

GRANTS FBISD's motion for summary judgment; GRANTS the City's motion for summary judgment; Grants McAlister's motion for summary judgment; DENIES as moot defendants' motion for leave to take depositions; and DENIES as moot the City's and McAlister's motion to strike the affidavit of Joseph W. Glezman. The reasons for this court's rulings are set below.

I. Background

On February 28, 1994, Dennis Campbell, Jr. ("Dennis"), then a five year-old kindergarten student at Dulles Elementary School, was misbehaving in class. The parties dispute whether Dennis was "completely out of control" or misbehaving in a milder fashion.[1] Plaintiffs' summary judgment evidence is that Dennis was upset because he thought his teacher had treated him unfairly earlier in the day. Dennis refused to do his work and threw a paper clip. In response to Dennis' actions, his teacher, Kelly Hanse ("Hanse"), told Dennis that he had forfeited his play time. Dennis then refused to obey her instructions. When Dennis refused to stand up as ordered, Hanse requested the assistance of Assistant Principal Beverly Bollinger ("Bollinger"). (Docket Entry No. 40, Ex. F., Hanse Affidavit, ¶4). Bollinger told Dennis to go to the principal's office. Dennis refused to stand up or move and told Bollinger to "shut up." (Docket Entry No. 40, Ex. E, Bollinger Affidavit, ¶3; Docket Entry no. 41, Ex. A, Dennis Deposition, p. 16).

Bollinger then approached McAlister, a Sugarland police officer recently assigned to teach at Dulles as part of a nation-wide drug prevention program known as "D.A.R.E.," an

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[1] *Compare* Docket Entry No. 43, Ex. B, Kelly Hanse Deposition, p. 121 *with* Docket Entry No. 46, Ex. A, Dennis Deposition, p. 16.

acronym for Drug Abuse Resistance Education. Bollinger asked McAlister to assist in removing Dennis from the classroom and escort Dennis to the principal's office. (Docket Entry No. 40, Ex. C, McAlister Affidavit, ¶2-3; Ex. E, Bollinger Affidavit, ¶3). Bollinger sought McAlister's help because he was the only adult make in the building at the time. (Docket Entry No. 44, Ex. F, Bollinger Deposition, p. 39).

At this point, the accounts provided by plaintiffs and defendants diverge. According to plaintiffs, after Dennis refused to follow McAlister's instructions, McAlister "slammed [Dennis] down on the ground" with his arm, then "dragged [him] all the way to the principal's [office]." (Docket Entry No. 46, Ex. A, Dennis Deposition, p. 16). Dennis' mother, Tammie Campbell ("Mrs. Campbell"), estimates that the distance from the classroom to the principal's office is 200 to 300 feet. (Docket Entry No. 41, Ex. C, Mrs. Campbell Deposition, ¶4).

Defendants assert that Dennis resisted McAlister's efforts to get him to go to the principal's office. Defendant's summary judgment evidence is that Dennis tried to kick McAlister, lost his balance, and fell to the ground. (Docket Entry No. 40, Ex. F. Hanse Affidavit, ¶5; Ex. C, McAlister Affidavit, ¶4). Defendants assert that McAlister carried Dennis out of the classroom "with his feet off the floor" for the 10 to 15 feet it took to reach the hallway. (*Id.*). Once outside the classroom, Dennis walked hand-in-hand with McAlister to the principal's office, according to the defendants. (*Id.*).

Plaintiffs' and defendants' accounts also differ with respect to the nature of Dennis' injuries. Plaintiffs' summary judgment evidence is that later that day, Dennis complained that his neck, head, and shoulders hurt. The next morning, Dennis was taken

to see Dr. Matiu. Dennis had bruises on or under his arm. Plaintiffs also allege that Dennis was "traumatized" and suffers from fear, anxiety, asthma, and bedwetting as a result of the February 28, 1994 incident.[2]

Defendants argue that the summary judgment evidence shows that Dennis suffered from no physical or psychological injury. McAlister has provided an affidavit in which he states that, immediately after making contact with the floor, Dennis "neither cried out nor whimpered, nor did he express any pain." (Docket Entry No. 40, Ex. C, ¶4). Relying upon Mrs. Campbell's deposition testimony, defendants argue that, when Dennis was picked up from day care on February 28, 1994, he "did not have any scratches, torn clothing, and was not bleeding." (Docket Entry No. 40, p. 5; Ex. A, Mrs. Campbell Deposition, Vol I, pp. 87-88). Dennis' condition did not require x-rays or any type of follow-up medical examinations. (Docket Entry No. 40, p. 5-6; Ex. A, Vol I, pp. 96-100). Defendants argue that, to the extent that Dennis does have problems with bedwetting, anxiety, and asthma, these condi-

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[2] The record includes Dr. Matiu's notes from Dennis' March 1, 1994 examination, stating: "Policeman took child from arms, he fell back and hit the floor . . ." (Docket Entry No. 49, Ex. A) In a letter dated April 26, 1994, Dr. Matiu wrote that Dennis told her he "fell down and hit his head during that episode." (*Id.*, Ex. B, ¶2). Dr. Matiu than allegedly submitted this letter to plaintiffs. (Docket Entry No. 45, ¶3). The words "he fell down and hit" were crossed out and the phrase "the officer push him down an hurt [sic]" penciled in. (*Id.*, Ex. C). Subsequently, Dr. Matiu resubmitted the letter, again dated April 26, 1994, this time incorporating the requested revisions. Attorneys for FBISD assert that on May 8, 1997, they received a phone call from Dr. Matiu's attorney, informing FBISD that Dr. Matiu had "changed her report to falsely reflect that the minor Plaintiff had been 'pushed' at Mrs. Campbell's insistence." (Id., ¶5). On the basis of this telephone call, as well as the discrepancies between Dr. Matui's two letters, defendants have filed motions for leave to take depositions of Mr. Matiu and Tammy Campbell. (Docket Entry Nos. 45 and 49). This court does not rely on the facts made the basis of this dispute and denies the deposition request as moot.

tions existed before February 28, 1994, and were not caused by McAlister's alleged use of excessive force. (Docket Entry No. 43, p. 6; Ex. A, Dennis Deposition, pp. 35, 50-51; Ex. C; Docket Entry No. 44, Ex. J, p. 3).

On January 24, 1996, plaintiffs Dennis Campbell, Sr., and Tammie Campbell, as next of friends of Dennis Campbell, Jr., sued McAlister, the City, and FBISD in the district court of Fort Bend County, Texas, alleging that, while acting under color of state law, McAlister used excessive force to remove Dennis from his classroom on February 28, 1994, and that the City and FBISD were negligent and deliberately indifferent to Dennis' constitutional rights. (Docket Entry No. 1, Ex. A). On April 24, 1996, defendants removed that case to this court. (Docket Entry No. 1).

Defendants McAlister, the City, and FBISD moved for summary judgment, asserting that plaintiffs presented no actionable claim under the Fourth and Fourteenth Amendments to the United States Constitution. (Docket Entry Nos. 39 and 44). On May 2, 1997, defendants McAlister and the City filed a motion to strike the affidavit of Joseph W. Glezman.[3] (Docket Entry No. 43). Defendants McAlister, the City, and FBISD have also moved for leave to depose Dr. Irina Matiu and Tammie Campbell. (Docket Entry Nos. 45 and 49).

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[3] In their response to defendants' motions for summary judgment, plaintiffs included the affidavit of "Joe Glezman, an expert in the field of police use of force," in which Glezman stated that "excessive force was used on Dennis Campbell by Butch McAlister on February 28, 1994," based on his review of Dennis' statement and Mrs. Campbell's affidavit. (Docket Entry No. 41, p. 11, Ex. B). Defendants moved to strike Glezman's affidavit on the ground that plaintiffs had not designated Glezman as an expert in their list of expert witnesses, filed on January 21, 1997, and had not supplemented their list under Rule 26(e) to add Glezman as an expert witness. This court denies the motion to strike as moot.

II. The Summary Judgment Standard

Summary judgment is appropriate if no genuine issue of material fact exists and the moving party is entitled to judgment as matter of law. FED. R. CIV. P. 56. Under FED. R. CIV. P. 56(c), the moving party bears the initial burden of "informing the district court of the basis for its motion, and identifying those portions of [the record] which it believes demonstrate the absence of a genuine issue for trial." *Celotex Corp. v. Catrett*, 106 S. Ct. 2548, 2553 (1986); *Norman v. Apache Corp.*, 19 F.3d 1017, 1023 (5th Cir. 1994). The party moving for summary judgment must demonstrate the absence of a genuine of issue of material fact, but need not negate the elements of the nonmovant's case. *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994). If the party moving for summary judgment meets its initial burden, the motion for summary judgment must be denied, regardless of the nonmovant's response. *Little*, 37 F.3d at 1075.

When the moving party has met its Rule 56(c) burden, the nonmovant cannot survive a motion for summary judgment by resting on the mere allegations of its pleadings. *McCallum Highlands, Ltd. v. Washington Capital Dus, Inc.*, 66 F.3d 89, 92 (5th Cir. 1995). The nonmovant must go beyond the pleadings and designate specific facts showing that there is a genuine issue for trial. *Little*, 37 F.3d at 1075 (citing *Celotex*, 106 S. Ct. at 2553-54).

In deciding a summary judgment motion, "[t]he evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson v. Liberty Lobby, Inc.*, 106 S. Ct. 2505, 2513 (1986). "Rule 56 mandates the entry of summary judgment, after adequate time for discovery, and upon motion, against a party who fails to make a showing

sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Little*, 37 F.3d at 1075 (citing *Celotex*, 106 S. Ct. at 2552).

III. Defendants' Motions for Summary Judgment

A. Fort Bend Independent School District

Plaintiffs sue FBISD under 42 U.S.C. § 1983, alleging that FBISD failed to give adequate training or supervision to its employees, with deliberate indifference to the constitutional rights of Dennis Campbell, Jr. (Docket Entry No. 12, Amended Original Petition, p. 3). FBISD asserts that, as a matter of law, it is not liable to plaintiffs.

The standard for municipality liability was established by the Supreme Court in *Monell v. Dept. of Social Serv.*, 98 S. Ct. 2018 (1978). In *Monell*, the Court held that a municipality cannot be held liable "unless action pursuant to official policy of some nature caused a constitutional tort. . . . [A] municipality cannot be held liable solely because it employs a tortfeasor." *Monell*, 98 S. Ct. at 2036. The courts have consistently refused to hold a municipality "strictly liable for the acts of its non-policy making employees under a *respondeat superior* theory." *Colle v. Brazos County, Tex.*, 981 F.2d 237, 244 (5th Cir. 1983) (citing *Oklahoma City v. Tuttle*, 105 S. Ct. 227, 243 (1985)).

The Fifth Circuit has defined an official policy, for the purpose of section 1983, as a "policy statement, ordinance, regulation, or decision that is officially adopted and promulgated by the municipality's lawmaking officers or by an official to whom the lawmakers have delegated policy-making authority." *Cole*, 981 F.2d at 245. In addition to showing the

existence of an official policy, "the plaintiff must also demonstrate that, through it *deliberate* conduct, the municipality was the 'moving force' behind the injury alleged." *Bd. of County Com'rs of Bryan County, Okla. v. Brown*, 117 S. Ct. 1382, 1385 (1997) (emphasis in original) (citing *Monell*, 98 S. Ct. 2027).

Plaintiffs do not raise a fact issue as to whether an official FBISD policy sanctioned the use of excessive force against unruly students by D.A.R.E. officers on school campuses.[4] Plaintiffs do not allege or present summary judgment evidence of a written FBISD school board policy that encouraged or condoned the use of excessive force against students. (Docket Entry No. 44, Ex. G, Tammie Campbell Deposition, Vol. III, p. 287). The defendants have submitted competent summary judgment evidence of the absence of "any other occurrence during which a D.A.R.E. officer was asked to assist a teacher in this way at Dulles Elementary (or any other school in any [sic] FBISD)." (Docket Entry No. 44, Ex. C, Perrin-McAllister Affidavit, ¶5; Ex. H, Perrin-McAllister Deposition, p. 33).

Plaintiffs argue that the principal of Dulles Elementary School, Jane Perrin-McAllister ("Perrin-McAllister"), was a final policymaker, and that she had established policy of encouraging or condoning the use of excessive force against students at Dulles. Plaintiffs fail to raise a fact issue as to whether Perrin-McAllister had the type of final policymaking authority that would subject FBISD to liability under section 1983. *Eugene v. Alief Indep. Sch. Dist.*, 65 F.3d 1299, 1304 (5th Cir. 1995), *cert. denied by Conley v. Eugene*, 116 S. Ct.

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[4] For the purpose of analyzing municipal liability, this court assumes that such a policy implicate constitutionally or federally protected rights.

1680 (1996). "[W]hether an official had 'final policymaking authority' is a question of state law." *Jet v. Dallas Indep. Sch. Dist.*, 109 S. Ct. 2702, 2723 (1989) (citing *St. Louis v. Praprotnik*, 108 S. Ct. 915, 924 (1988) (emphasis in original)) (quoting *Pembaur v. City of Cincinnati*, 106 S. Ct. 1292, 1300 (1986) (plurality opinion)). "[S]tate law (which may include valid local ordinances and regulations) will always direct a court to some official or body that has the responsibility for making law or setting policy in any given area of local government's business." *Flores v. Cameron County, Texas*, 92 F.3d 258, 263 (5th Cir. 1996) (quoting *Praprotnik*, 108 S. Ct. at 925). The inquiry into which individuals which have final policymaking authority for the purpose of section 1983 is a legal, not factual, question. *Jett*, 109 S. Ct. at 2724.

Under Texas law, the school board of an independent school district, such as FBISD, is its final policymaker. *See Jett*, 7 F.3d at 1245 (citing TEX. EDUC. CODE ANN. §§ 23.01 & 23.26(b) & (d) (Vernon 1987)); *Eugene*, 65 F.3d at 1304. Texas law is clear that although "the principal is to exercise decision-making authority in certain areas, even in those areas the principal must follow the guidelines and policies established by the school district." *Eugene*, 65 F.3d at 1304. Even if Perrin-McAllister did have decision-making authority to discipline students, this is insufficient to raise a fact issue as to her policymaking authority *Id.* at 1305.[5]

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[5] Plaintiffs argue that Perrin-McAllister had discretionary authority over her school and the individuals who were employed there. (See Docket Entry No. 46, Ex. D, pp. 37-40). There is no evidence that the Fort Bend School Board delegated Perrin-McAllister final policymaking authority. Discretionary authority to order an individual on campus to leave is insufficient to raise a fact issue of final policymaking authority for the purpose of section 1983 liability. *See Bennett*, 728 F.2d at 762; *see also Eugene*, 65 F.3d at 1304-1305.

Plaintiffs also fail to raise fact issue that Perrin-McAllister had a policy of sanctioning the use of excessive force against unruly students by D.A.R.E. officers present in the school. The summary judgment evidence on which plaintiffs rely is an allegation from Mrs. Campbell that, "while attending a parent/teacher organization meeting in the fall of 1993," she heard Principal Perrin-McAllister say that she (Perrin-McAllister) "would allow the use of officers to discipline and influence child bullies on campus," (Docket Entry No. 46, Ex. C, Tammie Campbell Affidavit, ¶5), and deposition testimony from Perrin-McAllister stating: "I would never tell a D.A.R.E. officer not to help a teacher in any way he could." (Docket Entry No. 46, Ex. D, Perrin-McAllister Deposition, p. 114). Plaintiffs argue that the statements show that a "policy was put in place by Principal Perrin-McAllister, whereby she, or those acting in her place, would call upon the school D.A.R.E. officer for assistance whenever confronted by a child who she was [sic] a discipline problem." (Docket Entry No. 46, p.7). Plaintiffs argue that "[t]he policy allows a D.A.R.E. teacher to [use] any level of force, something neither an officer or teacher is constitutionally permitted to do." (Docket Entry No. 46, p. 11).

Plaintiffs' arguments do not follow from the summary judgment evidence and do not raise a fact issue sufficient to prevent summary judgment. *See Campbell v. City of San Antonio*, 43 F.3d 973, 975 (5th Cir. 1995) (citing *Fernandez-Montez v. Allied Pilots Ass'n*, 278, 284 (5th Cir. 1983)). The statement from Mrs. Campbell's affidavit, although it fails to quote Perrin-McAllister, is not materially relevant. The word "discipline" is not synonymous with "use of excessive force against." *Cf. Eugene*, 65 F.3d at 1304 (finding that "evidence

of a school manual allowing teachers to use physical force against children that were found out of control" did not create a fact issue as to whether the use of excessive force was an official policy of the school district). The uncontroverted testimony is that no excessive force complaints have been lodged against any D.A.R.E. officer in the Fort Bend Independent School District. (*See* Docket Entry No. 44, Ex. C, Perrin-McAllister Affidavit, ¶5; Ex. H, Perrin-McAllister Deposition, p.33).

Plaintiffs also argue that Perrin-McAllister's failure to discipline McAlister, and her failure to prohibit D.A.R.E. officers from assisting teachers in the future, is a "ratification" of an unconstitutional act that subjects FBISD to liability. (Docket Entry No. 46, Plaintiffs' Response to FBISD's Motion for Summary Judgment, pp. 13-14; Ex. D, Perrin-McAllister Deposition, pp. 113-14). This argument fails.

In *Praprotnik,* the Supreme Court explained that a "series of decisions by a subordinate official [could] manifest[] a 'custom or usage' of which the supervisor must have been aware." *St. Louis v. Praprotnik,* 108 S. Ct. 915, 928 (1988) (plurality opinion) (emphasis added); *Flores*, 92 F.3d at 269. The Court made it clear that a single unconstitutional act by a subordinate is generally insufficient to hold a municipality liable for that subordinate's action. *See Colle*, 981 F.2d at 237. "Furthermore, the fact that the official policymaker simply goes along with a subordinate's discretionary decisions is not a delegation of policymaking authority." *Flores*, 92 F.3d at 269 (citing *Praprotnik,* 108 S. Ct. at 928). "Except perhaps as a step toward possessing such 'de facto' authority would serve primarily to foster needless unpredictability in the application of § 1983." *Id.* Unofficial activity must be widespread and

"so permanent and well settled as to constitute a 'custom or usage' with the force of law" before it can impose liability on a municipality. *Praprotnik,* 108 S.Ct. at 926 (quoting *Adickes v. S.H. Kress & Co.,* 90 S. Ct. 1598, 1613-14 (1970)).

The failure to discipline McAlister is, as a matter of law, not a basis for imposing liability on FBISD. *See Praprontnik,* 108 S. Ct. at 926; *see also Coon v. Ledbetter*, 780 F.2d 1158 (5th Cir. 1986). Perrin-McAllister's decision not to discipline McAlister was not "cast in the form of a policy statement," nor was it "approved by the supervising policymaker," FBISD. *Flores,* 92 F.3d at 269 (quoting *Praprotnik,* 108 S. Ct. 928).

Plaintiffs allege that FBISD had a policy of inadequate training or supervision. Inadequacy of training, for the purpose of section 1983 liability, must rise to the level of "deliberate indifference." *Rhyne v. Henderson County,* 973 F.2d 386 (5th Cir. 1992) (citing *City of Canton v. Harris,* 109 S. Ct. 1197, 1204-1205 (1989)). "Only where a failure to train reflects a 'deliberate or conscious' choice by a municipality — a 'policy' as defined by our prior cases — can a city be liable for such a failure under § 1983." *City of Canton,* 109 S. Ct. at 1205; *see also Gonzales v. Yselta Indep. Sch. Dist.*, 996 F.2d 745, 757 (5th Cir. 1983).

The Supreme Court has recently made it clear that inadequate training claim requires a showing of a deficient training "program," necessarily intended to apply over time to multiple employees. *Bryan County v. Brown,* 117 S. Ct. at 1390. "Existence of a 'program' makes proof of fault and causation at least possible in an inadequate training case. If a program does not prevent constitutional violations, municipal decisionmakers may eventually by put on notice that a new program is called for. Their continued adherence to an ap-

proach that they know or should know has failed to prevent tortious conduct by employees may establish the conscious disregard for the consequences or their action--the 'deliberate indifference'--necessary to trigger municipal liability." *Id.* Only in a very narrow range of circumstances can a violation of federal rights be such a "highly predictable consequence of a failure to equip law enforcement officers with the specific tools to handle recurring situations" so as to justify an inference that the municipality was indifferent and that the indifference led directly to the specific constitutional or statutory right violation. *Id.* at 1391.

In a case based on a claim of inadequate screening when a particular employee was hired, the Supreme Court held that:

> Only where adequate scrutiny of an applicant's background would lead a reasonable policymaker to conclude that the plainly obvious consequence of the decision to hire the applicant would be the deprivation of a third party's federally protected right can the official's failure to adequately scrutinize the applicant's background constitute "deliberate indifference."

Id. The Fifth Circuit has adopted a three-pronged test for establishing when, due to inadequate training or hiring, a municipality may be held liable under section 1983:

> (1) the training or hiring procedures of the municipality's policy maker were inadequate,
>
> (2) the municipality's policymaker was deliberately indifferent in adopting the hiring or training policy, and
>
> (3) the inadequate hiring or training policy directly caused the plaintiff injury.

Baker v. Putnal, 75 F.3d 190, 200 (5th Cir. 1996) (citing *City*

of Canton, 109 S. Ct. at 1205-1207).

Plaintiffs fail to raise a fact issue as to any of these elements. There is no allegation or summary judgment evidence of a training program that was deficient or that caused constitutional violations. There is no allegation or summary judgment evidence that there were deficient hiring policies or a failure to screen McAlister's background adequately, or that a different hiring policy would have led to a different result.

Defendant FBISD's motion for summary judgment is GRANTED.

B. The City of Sugarland

In the plaintiffs' complaint (labeled "Amended Original Petition"), they allege that "[t]he City of Sugarland and the supervisors of Butch McAlister failed to train or discipline Butch McAlister . . . [in] deliberate indifferent to Dennis Campbell Jr.'s rights." (Docket Entry No. 12, p. 3). In their response to McAlister's and the City's motions for summary judgment, plaintiffs do not mention the City or any claim on which the City could he held liable. (Docket Entry No. 41, Plaintiff's Response to Defendant McAlister's and the City's Motion for Summary Judgment). Nevertheless, this court assumes that plaintiffs continue to pursue their claim against the City.

Plaintiffs appear to assert that the City failed to "train, . . . educate and supervise" McAlister and failed to discipline McAlister after it had notice of his alleged unconstitutional activity. (Docket Entry No. 12, pp. 3-4). Plaintiffs have failed to allege or present any evidence as to a policy or custom of the City that violated Dennis Campbell's constitutional rights. The only apparent involvement by the City is that Sergeant Judy

Falgg, a Sugarland police officer, was in charge of the D.A.R.E. program (*see* Docket Entry No. 44 Ex. E, Ernest Taylor Deposition, pp. 12-20). The City cannot be held liable on a theory of *respondeat superior*. *See Colle*, 981 F.2d 244.

Even assuming that plaintiffs have alleged a failure to train or supervise, the City is entitled to summary judgment. Plaintiffs present no evidence of inadequate training, education or supervision. *See Baker*, 75 F.3d at 200. The uncontested evidence is that the D.A.R.E. program was supervised and that all D.A.R.E. officers had to undergo a special D.A.R.E. certification program before they could work at a public school. (Docket Entry No. 44, Ex. E, Taylor Deposition, pp. 20-21, 40). In addition, there is no evidence that any complaints had been lodged against any D.A.R.E. officer, including McAlister. (*Id.*, Ex. H, p. 33).

The City's motion for summary judgment is GRANTED.

C. Oliver "Butch" McAlister

Plaintiffs allege that McAlister used excessive force against Dennis Campbell, in violation of the Fourth and Fourteenth Amendments to the United States Constitution. (Docket Entry No. 12, p. 3). Defendant McAlister moves for summary judgment based on qualified immunity. To defeat defendant's qualified immunity defense, plaintiffs must show that: (1) Dennis has "asserted a violation of a constitutional right"; (2) this right was "clearly established" at the time of McAlister's allege use of excessive force, February 28, 1994; and (3) McAlister's actions were "objectively unreasonable." *Eugene*, 65 F.3d at 1305 (citing *Siegert v. Gilley*, 111 S. Ct. 1789, 1793 (1991)).

Excessive force claims bought under section 1983 are not

governed by a single generic standard. *Graham v. Conner*, 109 S. Ct. 1865, 1870 (1989). The specific constitutional right allegedly infringed by the challenged application of force must be identified. *Id.* If a constitutional claim is governed by a specific constitutional provision, such as the Fourth Amendment, the claim must be analyzed under the standard appropriate to that specific provision, not under the rubric of substantive due process. *United States v. Lanier*, 117 S. Ct. 11219, 1228 n.7 (1997).

The Supreme Court has explicitly refused to address whether excessive force by public school teachers and administrators against students implicates a constitutional right. In *Ingraham v. Wright*, 97 S. Ct. 1401 (1977), the Court held that corporal punishment in the schools did not implicate a right to be free from cruel and unusual punishment under the Eighth Amendment. *Id.* at 1412. It also decided that, while corporal punishment in public schools does implicate students' liberty interests, students are not entitled to procedural due process under the Fourteenth Amendment before corporal punishment is inflicted: "traditional common-law remedies are fully adequate to afford due process." *Id.* at 1413.

The threshold issue raised by McAlister's motion is whether the Fourth or Fourteenth Amendment applies.[6]

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[6] In a recent decision, the Ninth Circuit declined to decide whether the Fourth Amendment rather than the Due Process Clause under the Fourteenth Amendment applies to cases involving allegations of excessive force against a student by a school official. *P.B. v. Koch*, 96 F.3d 1298 (9th Cir. 1996). In *Koch*, the court considered three separate incidents involving a principal who allegedly used excessive force against students. The principal allegedly repeatedly slapped and choked one student for calling him a name; punched another student who disobeyed an order to be quiet; and choked yet another student who disobeyed an order to remove his hat. *Koch*, 96 F.3d at 1299-1300. Because the principal's alleged actions were "clearly unlawful" under any standard, the court did not decide

1. The Fourth Amendment

The Fourth Amendment, which protects individuals' liberty and privacy interests, applies principally in the context of law enforcement. *See Ingraham*, 97 S. Ct. at 1414 n.42 (noting that "[t]he principal concern of the Fourth Amendment's prohibition against unreasonable searches and seizures is with intrusions on privacy in the course of criminal investigations"). The United States Supreme Court has recognized that "a seizure occurs for Fourth Amendment purposes when, by physical force (however slight) or a show of authority, a law enforcement officer restrains the liberty of a citizen in some way." *Fontenot v. Cormier*, 56 F.3d 669, 674 (5th Cir. 1995) (citing *California v. Hodari*, 111 S. Ct. 1547 (1991)).

The Supreme Court has held that the Fourth Amendment can apply in the school context. *New Jersey v. T.L.O.*, 105 S. Ct. 733 (1985). In *T.L.O.*, the Supreme Court held that the Fourth Amendment applies to searches of students by school administrators in public schools. *Id.* In applying the Fourth Amendment in the school context, however, the Court held that school officials may search students if reasonable to do so under the circumstances, a lower test than applies to police searches under the Fourth Amendment. *Id.* at 742. The Court noted that immediate, effective action may be needed to deal with the frequent occurrence of events that call for student discipline. *Id.* at 741. The diminished protection of the Fourth Amendment for public schoolchildren is proper, the Court reasoned in *T.L.O.*, because classroom discipline and school order are crucial to effective education. *Id.*

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whether the proper analysis was a Fourth Amendment seizure or a Fourteenth Amendment due process deprivation. *Koch*, 96 F.3d at 1303 n.4.

In *Hassan v. Lubbock Indep. Sch. Dist.*, the Fifth Circuit noted the "unique backdrop that schools present for the operation of the Fourth Amendment," and, echoing *T.L.O.*, found that "while school officials are subject to the limitations of the Fourth Amendment, the reasonableness of seizure must be determined in light of all circumstances, with particular attention being paid to whether the seizure was justified at its inception and reasonable in scope." 55 F.3d 1075, 1079 (5th Cir.), *cert. denied*, 116 S. Ct. 532 (1995).

One court has explained the Fourth Amendment standard applied in the school context, as follows:

> The distinction between deprivations of liberty in school and in the law enforcement context highlights what, to begin with, amounts to an awkward fit between the Fourth Amendment and non-law enforcement action. With regard to school searches, or even school seizures of students' property, the fit is not so difficult because the goals of such searches and seizures are similar to the goals of law enforcement in searching and seizing private property: to detect aberrant behavior and to retrieve property.
>
> There is little parallel, however, between the school and law enforcement situations when there is a seizure of the person. The basic purpose for the deprivation of a student's personal liberty by a teacher is education, while the basic purpose for the deprivation of liberty of a criminal suspect by a police officer is investigation or apprehension. The application of the Fourth Amendment is necessarily different in these situations.

Wallace by Wallace v. Batavia Sch. Dist., 68 F.3d 1010, 1014 (7th Cir. 1995).

The threshold issue with respect to the Fourth Amendment in this case is whether the Fourth Amendment applies differently here than in other cases in the public school context because McAlister was a police officer teaching under the D.A.R.E. program rather than a "regular" teacher.

It is undisputed that McAlister was not at Dulles Elementary to investigate suspected criminal activity or to apprehend a suspect. Nor was McAlister present to provide security at the school. It is undisputed that McAlister was at the school to teach, and that he had obtained certification for this purpose. It is also undisputed that McAlister was asked to escort Dennis to the principal's office, not because McAlister was a police officer, but because he was the only male school official in the building when the need for assistance with an recalcitrant student arose. In her deposition testimony, the assistant principal, Bollinger stated that she "went to get [McAlister] just to come with me as a representative of the male [sic] to convince Dennis to come to the office," and that McAlister was the only male adult in the building at the time. (Docket Entry No. 44, Ex. F, P. 39).

There is no evidence that McAlister's role was different in relevant aspects than that of other teachers or administrators at Dulles Elementary. Plaintiffs' own summary judgment evidence includes an affidavit from Tammie Campbell's stating that "Principal Perrin[-McAllister] stated that Officer McAlister was a teacher at Dulles Elementary. . . . He was not there as a police officer." Docket Entry No. 46, Ex. C, Mrs. Campbell Affidavit, ¶6).

Based on this undisputed record, the appropriate standard to apply to McAlister's actions is the standard for a school teacher or administrator responding to a student's behavior, not

the standard for a police officer investigating a crime or apprehending a suspect.

One of the fundamental reasons that courts so heavily scrutinize seizures when carried out by police is because such seizures, in addition to depriving an individual of liberty, "threaten prolonged incarceration." *Wallace*, 68 F.3d at 1014. At no time was Dennis' "liberty to live free of the criminal justice process" threatened in any way. *Id.* The Supreme Court has held that diminished Fourth Amendment protections can be appropriate even in a law enforcement setting. The Fourth Amendment standard for an investigatory stop, for example, is not as demanding as the standard for an arrest. *See id.* (citing *Terry v. Ohio*, 88 S.Ct. 1868, 1883 (1968)). None of the Fourth Amendment's core protections against searches and seizures were implicated by McAlister's actions. The Fourth Amendment does not apply differently here than in other cases in the school context.

The question therefore becomes, whether, under the controlling Fifth Circuit law, the Fourth Amendment is implicated by McAlister's alleged use of excessive force.

The Fifth Circuit has held that the Fourth Amendment applies to punitive detentions of disobedient students. *Hassan*, 55 F.3d at 1075. In *Hassan*, the Fifth Circuit held that locking a student in a small room for fifty minutes because he was inattentive and disrespectful on a field trip implicated the student's Fourth Amendment right to be free from an unreasonable seizure. *Hassan*, 55 F.3d at 1079; *citing Edwards for and in behalf of Edwards v. Rees*, 883 F.2d 882 (10th Cir. 1989) (a principal's interrogation of a student was analyzed under, and found not to violate, the Fourth Amendment).

However, the Fifth Circuit has also specifically held that the

Fourth Amendment does not apply to a teacher or school administrator who uses corporal punishment, even with allegedly excessive force, against a student, in the context of imposing discipline and maintaining order. *Fee v. Herndon*, 900 F.2d 804, 810 (5th Cir.), *cert. denied*, 111 S. Ct. 279 (1990).[7] *Fee* involved a student who was paddled on the buttocks by a school principal, as punishment for disruptive behavior in a classroom. The Fifth Circuit specifically stated that "the paddling of recalcitrant students does not constitute a fourth amendment search and seizure." *Id.* No Fifth Circuit case has applied the Fourth Amendment to cases involving alleged non-sexual physical force applied to a student by a school official in the context of imposing discipline and maintaining order.

Taking the facts as alleged be plaintiffs, in the light most

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[7] The Seventh Circuit has held that the Fourth Amendment applies to a teacher or administrator who uses force in the context of school discipline. In *Wallace by Wallace v. Batavia School Dist. 101*, 68 F.3d 1010 (7th Cir. 1995), a teacher broke up a screaming match between two students by ordering one of the students to leave the class room; when the student delayed, the teacher grabbed the student's wrist, pulled her toward the door, and grabbed her by the elbow to "expedite her departure." The Seventh Circuit held that this was a seizure to which the Fourth Amendment applied, but in a limited fashion. *Id.* The court held that because of the special relationships presented in the school context and the need to afford "teachers and administrators an acceptable range of action dealing with disruptive students while still protecting students against potentially excessive use of state power," there should only be a narrow range of Fourth Amendment seizure claims arising out of school disciplinary matters. *Id.* at 1014. The court held that "in the context of a public school, a teacher or administrator who seizes a student does so in violation of the Fourth Amendment only when the restriction of liberty is unreasonable under the circumstances then existing and apparent. . . . in seeking to maintain order and discipline, a teacher or administrator is simply constrained to taking reasonable action to achieve those goals. Depending on the circumstances, reasonable action may certainly include the seizure of a student in the face of provocative behavior." 68 F.3d at 1014.

favorable to plaintiffs, their claims to not implicate the Fourth Amendment under the Fifth Circuit authorities. McAlister is alleged to have asked Dennis to come with him twice; when Dennis refused, McAlister is alleged to have pushed him to the floor and dragged him to the principal's office. McAlister is not alleged to have detained Dennis or kept him in an isolated room, as in *Hassan* and *Edwards*. The type and nature of force allegedly used by McAlister is more similar to the type and nature of force used in other cases in the which the Fifth Circuit has denied Fourth Amendment causes of action, including *Fee* (paddling of a special education student) and *Cunningham v. Beavers*, 858 F.2d 269 (5th Cir. 1988) (paddling of a six year-old kindergarten student), *cert denied*, 109 S. Ct. 1343 (1989), than it is to the detention cases of *Hassan* and *Edwards*.

Even applying Fourth Amendment standards to this case, as the case law has tailored them to the school discipline context, plaintiffs have failed to tender summary judgment evidence sufficient to preclude summary judgment on the basis of qualified immunity. The cases that have examined allegations that a teacher or school official pulled a student, pushed a student, or dragged a student to make a student comply with an order to move or leave a room, have found no constitutional violation, as a matter of law. *See, e.g., Wallace*, 68 F.3d 1010; *Jones v. Witinski*, 931 F. Supp. 364 (M.D. Pa. 1996).

In this case, plaintiffs admit that Dennis was disobedient and recalcitrant. (Docket Entry No. 46, Ex. A, Dennis Deposition, p. 16). After Dennis refused twice to comply with McAlister's order to leave the classroom, and McAlister put his hands on Dennis to get him to move, Dennis fell to the ground. The disputes over whether Dennis fell because he tried to kick McAlister and lost his balance or because McAlister then

"dragged" Dennis all the way to the principal's office or "carried" him part of the way, are not material to resolving McAlister's qualified immunity defense. Resolving the disputed facts favorable to plaintiffs, it was not clearly established that McAlister's response to this recalcitrant student violated that student's constitutional rights. McAlister's conduct was not objectively unreasonable "in light of the legal rules clearly established at the time of the incident at issue," and therefore he has qualified immunity with respect to the Fourth Amendment claim. *Hassan*, 55 F.3d at 1079 (internal citations and quotations omitted).

2. The Fourteenth Amendment

Most courts have analyzed claims of excessive force against students by teachers and administrators under the Fourteenth Amendment substantive due process clause. *Wise v. Pea Ridge School Dist.*, 855 F.2d 560, 565 (8th Cir. 1988); *Metzger v. Osbeck*, 841 F.2d 518 (3rd Cir. 1988); *Webb v. McCullough*, 828 F.2d 1151, 1158 (6th Cir. 1987) (on a school band trip, a student locked herself in the bathroom after being told she would be sent home after boys and alcohol were found in or next to her room; the principal broke into the bathroom, picked her up, and threw her against the wall, and slapped her); *Garcia by Garcia v. Miera*, 817 F.2d 1151, 1158 (10th Cir. 1987), *cert. denied*, 108 S. Ct. 1220 (1988) (severe paddling); *Hall v. Tawney*, 621 F.2d 607 (4th Cir. 1980); *Jones v. Witinski*, 931 F. Supp. 364 (M.D. Pa. 1996) (a seventh grade teacher ordered a student to leave the classroom, then grabbed the student by the arm and pulled him, causing him to fall and strike his arm). The Fifth Circuit also analyzes the use of physical force by a school official against a disobedient or recalcitrant student in

terms of substantive due process under the Fourteenth Amendment to the Constitution. *Fee*, 900 F.2d at 808; *see also Coleman v. Franklin Parish Sch. Bd.*, 702 F.2d 74 (5th Cir. 1983) (per curiam) (the court analyzed under the Fourteenth Amendment, and then dismissed, an excessive force claim by a six year-old first-grade boy who, after engaging in horseplay, was stuck by a teacher on the head with a coffee cup and got a cut on his head that required stitches).

The Fifth Circuit has held specifically that a student has a substantive due process right to be free from arbitrary, capricious, or excessive punishment "wholly unrelated to the legitimate goal of maintaining an atmosphere conducive to learning." *Fee*, 900 F.2d at 808. The Fifth Circuit has also held, however, that if a state provides adequate post-punishment criminal or civil remedies for the mistreatment of students by educators, that state by definition does not act arbitrarily. *Fee*, 900 F.2d at 808 (quoting *Woodard v. Los Fresnos Indep. Sch. Dist.*, 732 F.2d 1243, 1246 (5th Cir. 1984)); *Coleman*, 702 F.2d at 75-76. Texas provides such remedies, the Fifth Circuit has determined. *Fee*, 900 F.2d at 808.[8] The fact that federal remedies may be more generous that state remedies "does not

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[8] *See* TEX. EDUC. CODE ANN. §22.051 (Vernon 1996) (providing qualified immunity for all professional employees of a school district, "except in circumstances in which a professional employee uses excessive force in discipline of students or negligence resulting in bodily injury to students.") McAlister is a "professional employee" for the purpose of this statute, since he is a "person whose employment requires certification and the exercise of discretion." TEX. EDUC. CODE ANN. §22.051(c)(4) (Vernon 1996). The statute does not preclude civil remedies. "If the measure of force applied to a student becomes excessive, common law tort remedies are available for damages." *Fee*, 900 F.2d at 808 n. 4 (internal citations omitted).

The Fourteenth Amendment is implicated, however, when *sexual abuse* of students by teachers or school officials is alleged. *See Doe v. Taylor Indep. Sch. Dist.*, 15 F.3d at 451-542.

make state relief inadequate." *Id.* at 809. Under *Fee*, Dennis Campbell's substantive due process claim fails as a matter of law.

Defendant McAlister's motion for summary judgment is GRANTED.

IV. Other Pending Motions

A. The Motion for Leave to Take Depositions

Defendant's motions for leave to take depositions of Mr. Matiu and Tammie Campbell is DENIED as moot.

B. Motion to Strike the Affidavit of Joseph W. Glezman

The City's and McAlister's motion to strike the affidavit of Joseph W. Glezman is DENIED as moot.

V. Conclusion

This court GRANTS FBISD's motion for summary judgment; GRANTS the City's motion for summary judgment; GRANTS McAlister's motion for summary judgment; DENIES as moot defendants' motion for leave to take depositions; and DENIES as moot the City's and McAlister's motion to strike the affidavit of Joseph W. Glezman.

SIGNED on July 3, 1997, at Houston, Texas.

Lee H. Rosenthal
Lee H. Rosenthal
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

DENNIS CAMPBELL, SR., *et al.*,	§	
	§	
Plaintiffs,	§	
	§	
VS.	§	CIVIL ACTION
	§	NO. H-96-1316
BUTCH McALISTER, *et al.*,	§	
	§	
Defendants.	§	

FINAL JUDGMENT

In accordance with the Court's Order of even date, this action is DISMISSED.

THIS IS A FINAL JUDGMENT.

SIGNED on July 3, 1997, at Houston, Texas.

Lee H. Rosenthal
Lee H. Rosenthal
United States District Judge

APPENDIX D

Amendment IV to
The Constitution of The United States

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

APPENDIX E

Amendment XIV, Section 1, to
The Constitution of The United States

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

APPENDIX F

42 U.S.C. § 1983

Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Supreme Court, U.S.
FILED
FEB 18 1999
CLERK

No. 98-1148

In The

Supreme Court of the United States

October Term, 1998

DENNIS CAMPBELL, SR., ET AL.,

Petitioners,

v.

BUTCH McALISTER,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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1688

QUESTION PRESENTED

Whether the Fifth Circuit United States Court of Appeals properly applied the correct Fourth and Fourteenth Amendment analysis when reviewing an "excessive force" allegation against a school official based on the official's removal of the student from the class due to the child's disruptive behavior and insubordination.

LIST OF PARTIES

1. Dennis Campbell, Sr. and Tammy Campbell, as next friend of Dennis Campbell, Jr., Petitioners.

2. Butch McAlister, Respondent.

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STATEMENT OF THE CASE

Respondent directs the Court to the facts as accurately outlined in the opinion of the court of appeals, (Pet. App. 2a-4a), but Respondent adds the following.

Respondent McAlister removed Dennis Campbell from an elementary school classroom after Dennis became disruptive and uncontrollable. Dennis was upset because he thought his teacher had mistreated him early in the day. Dennis refused to do his work and threw a paper clip. His teacher, Kelly Hanse, informed Dennis that his actions resulted in the forfeiture of his play time. When Dennis continued to refuse to obey instructions given by Ms. Hanse, she requested the assistance of assistant principal Beverly Bollinger. Bollinger instructed Dennis to go to the principal's office. Dennis refused to do so and told Bollinger to "shut up."

Bollinger then requested McAlister, a Sugarland police officer assigned to teach at Dulles as a part of a nationwide drug prevention program known as D.A.R.E., to assist in removing Dennis from the classroom and to escort Dennis to the principal's office. McAlister was the only adult male in the building at the time.

Dennis resisted McAlister's requests to go with him to the principal's office. Dennis attempted to kick McAlister and lost his balance in the process, falling to the ground. McAlister then carried Dennis out of the classroom "with his feet off the floor" for the 10 to 15 feet it took to reach the hallway. Once outside the classroom, Dennis walked with McAlister to the principal's office, holding McAlister's hand.

Contrary to this version of events, Petitioners alleged that McAlister slammed Dennis to the ground with excessive force. However, as the lower courts noted, the evidence shows that Dennis suffered no physical or psychological injury as a result of this incident. It is undisputed that when Dennis fell to the floor he neither cried out nor whimpered, nor did he express any pain. Dennis' mother noted that when she picked Dennis up from the day care on February 28, 1994, he "did not have any scratches, torn clothing, and was not bleeding." Dennis' condition required no x-rays nor follow up medical examinations of any sort.

SUMMARY OF ARGUMENT

Petitioners fail to demonstrate that any conflict exists among the circuits, or between the Fifth Circuit's decision and this Court's jurisprudence. Therefore, granting the writ of certiorari is not warranted. The Fifth Circuit properly applied decisions of this Court in measuring a § 1983 civil rights claim within the context of the Fourth and Fourteenth Amendments. The appropriate application of the Fourth Amendment is correct as a matter of law because when examining "force" by an official against a student, the test is whether the official was acting reasonably under the totality of the circumstances, keeping in mind the special needs of the educational environment.

Also, the Fourteenth Amendment does not apply in this situation where substantial due process is provided by state law. Notwithstanding whether Respondent, a police officer, was acting as a law enforcement official (as

opposed to an educator) in removing a disruptive student from the classroom, there is no question that some amount of force was required to remove Dennis from the class and state law provides adequate remedial measures to the extent such force was excessive.

ARGUMENT

REASONS FOR DENYING THE WRIT

A. Rule 10 jurisdiction is not invoked.

Petitioners cite 28 U.S.C. § 1254(1) as their jurisdictional basis for review. Petitioners' challenge underscores the reasons for Supreme Court Rule 10, which states:

> A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the course discretion, indicate the character of reasons this court considers:
>
> (a) a United States Court of Appeals has entered a decision in conflict with the decision of another United States Court of Appeals on the same important matter . . .
>
> (b) a United States Court of Appeals has decided an important question of federal law that has not been, but should be, settled by this court, or has been decided on an important federal question in a way that conflicts with relevant decisions of this court.

SUP.CT.R. 10.

Neither criteria is met here. In reality, the result in this case represents a legal determination of a fact specific inquiry which does not conflict with any other federal authority, from this Court or otherwise. For the reasons that follow, this Court's jurisdiction is not invoked under any prong of Rule 10. Therefore, the petition should be denied.

B. This case presents no question of federal law to be "settled," and no conflict exists between the Fifth Circuit's opinion and any other opinion of this Court, or any other circuit.

To prevail on a § 1983 civil rights claim, Petitioner must show that (1) he has asserted a violation of a constitutional right; (2) this right was clearly established at the time of the alleged wrongdoing; and (3) the Respondent's actions were objectively unreasonable. *Siegert v. Gilley*, 111 S.Ct. 1789, 1793 (1991). This Court has stated that "excessive force" claims brought under § 1983 are reviewed on a case-by-case basis. *Graham v. Conner*, 109 S.Ct. 1865, 1870 (1988). Additionally, if a constitutional claim is governed by a specific constitutional provision, that claim must be analyzed under the standard appropriate to that specific provision and not under the rubric of substantive due process. *United States v. Lanier*, 117 S.Ct. 1219, 1228 n.7 (1997). The lower courts properly used this Court's directives and reasoning to determine that the facts alleged by Petitioner did not constitute a violation of Dennis' Fourth and Fourteenth Amendment rights.

Unfortunately, the characterization of Petitioners' questions fails to address the justiciable issues upon which the suit was actually based. This Court has made clear that the schoolhouse presents different constitutional constructs for the Fourth and Fourteenth Amendments than do other situations in which these amendments may apply.

Further, Petitioners fail to demonstrate any conflict of authority among the circuits. The Fifth Circuit noted, and Petitioners emphasize here, that this Court has not ruled on the specific issue of excessive force by public school officials against students. However, the instant case does not present appropriate circumstances to decide that issue. No matter whether the Fourth or Fourteenth Amendment is considered as the constitutional foundation for Petitioners' claim, the facts as alleged by Petitioners do not establish a violation under either standard.

1. McAlister engaged Dennis not as a police officer but as an educator.

Petitioners disingenuously present their two questions as excessive force by a police officer. Such allegations raise serious fears in society regarding the abuse of power. McAlister was not in the school acting as a police officer. Rather, he was present in the school in the position of an educator.

It is undisputed that McAlister was a teacher in the school rather than a police officer investigating a crime or responding to a call. It is undisputed that McAlister was in the school to teach, and that he obtained a certification for that purpose. It is undisputed that McAlister was

asked to escort Dennis to the principal's office, not because he was a police officer, but rather because he was the only male school official in the building when the need for assistance with a recalcitrant student arose. Therefore, the appropriate standard to apply to McAlister's actions is the standard for that of a school teacher or an administrator responding to a student's behavior rather than a police officer. Case law generally affords educators more constitutional latitude in the classroom than that allowed in the context of an ordinary police search or seizure. *See New Jersey v. T.L.O.*, 105 S.Ct. 733 (1985).

In any event, the outcome of this case is not dependent on whether McAlister is characterized as an educator or a police officer. This is because, in either circumstance, his conduct is judged by an objective reasonableness standard. Even if the Court assumes McAlister was acting as a policeman, he is still entitled to qualified immunity, as the trial court and court of appeals concluded, because his use of force (if any force was used at all) was clearly reasonable under the circumstances.

2. The Fourth Amendment is not implicated in this instance because Respondent acted reasonably under the totality of the circumstances.

The Fourth Amendment analysis requires measurement of the force used in the context of the totality of the circumstances to determine if it gives rise to an unreasonable seizure. Dennis' seizure (assuming Petitioners' allegations as true) was not unreasonable under the totality

of the circumstances and, as such, does not rise to a violation under the Fourth Amendment. Petitioners' second question presented, which qualifies the use of force solely to prevent violence, is a misnomer. Petitioners wrongly suggest that force must only be used upon a student to subdue some violent or criminal intentions. The interest this Court sought to protect in *New Jersey v. T.L.O.*, 469 U.S. 325 (1985), was not to stop violence *per se* but rather "[maintain] discipline in the classroom and on school grounds." *Id.* at 339. This Court has also noted that the educational environment is different when examining the Fourth Amendment because of the school's "custodial and tutelary responsibilities for the children." *Veronia Sch. Dist. 47J v. Action*, 515 U.S. 646, 656 (1995). Fifth Circuit authority is consistent in that it has held that school officials are subject to the Fourth Amendment, and the standard of reasonableness is to be determined by the totality of the circumstances.[1] *See Hassan v. Lubbock Ind. Sch. Dist.*, 55 F.3d 1075, 1079 (5th Cir.1995), *cert. denied*, 116 S.Ct. 532 (1995).

An examination of the facts, taken in a light most favorable to Petitioners, shows that the force used to remove Dennis from the classroom was based on his

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[1] Petitioners disagree with the Fifth Circuit's position. In an attempt to show a conflict, they cite *P.B. v. Koch*, 96 F.3d 1298 (9th Cir. 1996). *Koch* is easily distinguished in that the Ninth Circuit found the defendant educator unreasonable in his actions. The violence the defendant inflicted on the students in that case dealt with incidents which took place outside the ambient of the educational environment. *See T.L.O.*, 469 U.S. at 339.

recalcitrance and his object misbehavior. This misbehavior was undisputedly a disruption to the classroom and therefore disturbed the learning environment of his fellow students. Under these circumstances, Dennis' removal, by some moderate amount of force, cannot be viewed as unreasonable. The lack of any injury to Dennis proves that no unreasonable force was used, even if McAlister "slammed" Dennis to the ground.[2]

To suggest, as Petitioners do, that McAlister was only reasonable in removing Dennis with force if he feared that Dennis had a gun, was using drugs, or was intent on committing a violent crime does violence to the long-held principles of this Court that, to maintain order and a learning environment in schools, educators require a certain amount of flexibility. *T.L.O.*, 469 U.S. at 340. This Court has also made clear that the education of children is the role and responsibility of parents, teachers, and state and local officials, not federal judges. *Hazelwood Sch. Dist. v. Kuhlmeir*, 484 U.S. 260, 263 (1988). It would be unwise for this Court to interject general, bright line restraints on classroom discipline by classifying specific correctional measures by educators as violations of certain constitutional rights. Rather, the current law of

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[2] Respondent is not suggesting that a particular, significant injury is required to state a claim, a position this Court has rejected in a related context. *Hudson v. McMillian*, 503 U.S. 1 (1992) (holding that a showing of serious injury not required to prove violation of cruel and unusual punishment clause). Rather, in the instant case, the absence of any bruising, bleeding, or need for medical care clearly shows that, if Dennis was "slammed" to the floor, it could not have been with unreasonable force.

allowing for a reasonability test on a case-by-case basis is the proper course to maintain this Court's long-held belief that schools are a place for learning.

3. The Fourteenth Amendment does not apply in this situation where substantial due process is provided for by state law.

The first question, as framed by Petitioners, asks whether students are protected by the Fourth and Fourteenth Amendments from excessive force even though "the student does not manifest outward, physical proof of injury." The question as presented would be, and in effect was, answered by the Fifth Circuit in the affirmative. The Fifth Circuit properly held that students do have substantive due process protections from excessive force and their bodily integrity is protected under the Fourteenth Amendment.[3]

The Fifth Circuit has clearly stated that a student is to be free from arbitrary, capricious, and excessive punishment "wholly unrelated to the legitimate goal of maintaining an atmosphere conducive to learning." *Fee v.*

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[3] This is true in many other circuits where courts have analyzed excessive force claims against students by teachers and administrators under the Fourteenth Amendment substantive due process clause. *Wise v. Pearidge Sch. Dist.*, 855 F.2d 560, 565 (8th Cir. 1988); *Metzger v. Osbek*, 841 F.2d 518 (3d Cir. 1988); *Webb v. McCullough*, 828 F.2d 1151, 1158 (6th Cir. 1987); *Garcia v. Miera*, 817 F.2d 1151, 1158 (10th Cir. 1987), *cert. denied*, 108 S. Ct. 1220 (1988); *Hall v. Tawney*, 621 F.2d 607 (4th Cir. 1980); *Jones v. Witinski*, 931 F.Supp. 364 (M.D.Pa. 1996).

Herndon, 900 F.2d 904, 808 (5th Cir.), *cert. denied*, 498 U.S. 908 (1990).

However, the Fifth Circuit has also held that if a state provides adequate post-punishment criminal or civil remedies for the alleged mistreatment of the student by the educator, the state, by so doing, does not act arbitrarily. *Fee*, 900 F.2d at 808; *Woodward v. Los Frenos Sch. Dist.*, 732 F.2d 1243, 1246 (5th Cir. 1984); *Coleman v. Franklin Parrish Sch. Board*, 702 F.2d 74, 75-76 (5th Cir. 1983) (per curiam). Furthermore, any injury received by a student due to corporal punishment,[4] regardless of the severity of the injury or the sensitivity of the child, fails to give rise to the Fourteenth Amendment's due process clause if adequate state remedies exist. *Fee*, 900 F.2d at 808; *Cuttingham v. Beavers*, 858 F.2d 269 (5th Cir. 1988), *cert. denied*, 489 U.S. 1067 (1989). Texas provides post-punishment remedies for the student, a matter Petitioners do not dispute. Therefore, no Fourteenth Amendment violation occurred in this instance, and the claim fails as a matter of law.[5]

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[4] To be sure, this is not a case of corporal punishment, but corporal punishment is the most analogous analytical framework because the claim arose out of disciplinary procedures.

[5] Looking again to *Lanier*, the only measure of Dennis' alleged civil rights violation is under the Fourth Amendment's reasonableness test or the Fourteenth Amendment's substantive due process protection. Petitioners argue that to look at reasonableness, one must examine the physical and emotional harm Dennis allegedly suffered. However, that is not a proper inquiry. Rather, these are issues of damages, which are determined according to common law tort principles, not constitutional constructs. *Memphis Comm. Sch. Dist. v. Stachura*, 477 U.S. 299, 306 (1986). Thus, Petitioners seek to move this Court far beyond the traditional reasonableness test.

CONCLUSION

In summary, the Court of Appeals properly applied the constitutional standards of an educator in a school and found that McAlister acted reasonably under the totality of the circumstances in order to maintain discipline in the classroom setting. And despite the force exacted upon Dennis, he has substantive due process rights under Texas law. Petitioners have shown no circuit conflict for this Court to address.

For all these reasons, this Honorable Court should deny the petition for writ of certiorari.

Respectfully submitted,

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